IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, their guardian, *Appellants,* vs. THE TRAVELERS INSURANCE COMPANY, *Appellee.*	No. 10,728
ZEILA BARR, *Appellant,* vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Appellee.*	No. 10,729

(CONSOLIDATED CASES)

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.

JOHN J. TAAFFE,
Phelan Building, San Francisco,
KEITH R. FERGUSON,
311 California Street, San Francisco,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Rules

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, their guardian, *Appellants,* vs. THE TRAVELERS INSURANCE COMPANY, *Appellee.*	No. 10,728
ZEILA BARR, *Appellant,* vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Appellee.*	No. 10,729

(CONSOLIDATED CASES)

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANTS.*

These appeals present identical questions and have been consolidated for hearing on one transcript as they were consolidated for trial in the District Court. Each is an appeal from a final judgment and order of the District Court dismissing the action with costs.

*Unless otherwise noted, the transcript references are to the transcript in Barr, et al. v. The Travelers etc., No. 10,728.

The first action was brought by the appellants therein, the minor children of Arthur Barr, deceased, against the appellee to recover the sum of $10,000, the said sum being the additional amount payable pursuant to the terms of an insurance policy in which appellants were named as beneficiaries in the event of the death of the deceased from accidental causes. The second action was brought by the widow of the deceased against the appellee for the same amount upon a similar policy.

JURISDICTIONAL STATEMENT.

(Rule 20, Section 2, Subdivision B, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.)

The statutory provisions believed to sustain the jurisdictions are as follows:

(1) The jurisdiction of the District Court.

USCA, Title 28, Section 41 (Judicial Code, Section 24), which provides:

> "The District Court shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000. and * * * is between citizens of different states."

(2) The jurisdiction of this Court upon appeal to review the judgments in question.

USCA, Title 28, Section 225 (Judicial Code, Section 128), which provides:

"The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

(3) Pleadings necessary to show the existence of jurisdiction.

(a) The complaint in William H. Barr, etc., et al. v. The Travelers Insurance Company. (T. R. p. 2.)

(b) The complaint in Zeila Barr v. Equitable Life Assurance Society of the United States. (T. R. p. 2.)

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgments in question.

On January 31, 1943, William H. Barr, a minor, and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, the appellants in No. 10,728, filed in the Superior Court of the State of California, in and for the City and County of San Francisco, the complaint against The Travelers Insurance Company (T. R. pp. 2-19), alleging that on or about the 26th day of February, 1932, the defendant and appellee, in consideration of a premium paid by Arthur Barr, insured the life of Arthur Barr, and executed and delivered to him a policy of insurance, a photostat of which is attached to the complaint, in which the appellants are named as beneficiaries, and that under the terms of the policy appellee agreed to pay to appellants the

sum of $10,000 upon the death of Arthur Barr, and an additional $10,000 immediately upon receipt of due proof that the death of Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means. After alleging that Arthur Barr paid all premiums falling due under the said policy, sets forth that Arthur Barr died on June 6, 1942, "from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, to-wit, a tick bite suffered by said Arthur Barr on or about the 31st day of May, 1942, and which said tick bite caused a visible contusion on the external body of said Arthur Barr, as well as internal injuries revealed by an autopsy".

After alleging that due notice and proof of death, the cause thereof, were given to appellee, on the forms required, and the making of a demand upon defendant for the payment of $20,000 as required by the policy, further alleges the payment by appellee of the sum of $10,000, and the refusal of appellee to pay the additional sum of $10,000 required by the policy.

On the same day, Zeila Barr, the surviving wife of the deceased, filed in the same State Court the complaint in No. 10,729 against the Equitable Life Assurance Society of the United States upon a policy containing like provisions of which she was the beneficiary, and to recover the same amount.

All of the appellants are citizens and residents of the State of California. The Travelers Insurance Company is a corporation organized under the laws

of the State of Connecticut, and therefore a citizen of that State, while the Equitable Life Assurance Society of the United States is a corporation organized under the laws and a citizen of the State of New York.

Thereafter on petition of the defendant each of said actions was removed from the State Court to the United States District Court for the Northern District of California. (T. R. p. 19.)

Thereafter the defendant in each action filed an answer in which the execution and delivery of the policy and the payment of the premiums called for therein, the presentation of the proofs of death, the making of the demand and the nonpayment of the additional sum of $10,000 payable in the case of accidental death were admitted. (T. R. p. 20.)

Thereafter the District Court made an order consolidating the two actions for trial. (T. R. p. 33.) The consolidated cases came on for trial on November 2, 3 and 4, 1943 before the Court without a jury (T. R. p. 34), and when the appellants had rested their case each of the appellees moved for a dismissal under Rule 41B of the Rules of Civil Procedure for the District Courts of the United States on the ground that upon the facts and the law plaintiff had shown no right to relief. The judgment in each case recites that plaintiff having objected to the said motion, and the motion having been argued by counsel and submitted to the Court for decision, and the Court having found that the motion is meritorious and that upon the facts and the law the plaintiffs had shown no right to relief, it was ordered, adjudged and decreed that

appellants take nothing by the complaints and that the actions be dismissed. (T. R. p. 34.)

Each of these judgments was entered in the District Court November 10, 1943. On January 31, 1944, the appellants in each case filed their several notices of appeal to this Court (T. R. p. 276; T. R. in 10,729, p. 30), together with their separate designations of contents of the record on appeal (T. R. p. 278; T. R. in 10,729, p. 33), and their separate statements of the points on which appellants intend to rely on their appeals. (T. R. pp. 276, 278; T. R. in 10,729, pp. 31, 41.) Counsel for the appellants and for the appellees consenting thereto, this Court made an order that the appeals be consolidated for hearing on one transcript consisting of the pleadings and judgment roll of each of said actions, together with the several notices of appeal and the several designations of the portion of the record to be used on said appeal, and the several statements of the points relied upon by appellants, with a single transcript of the testimony and proceedings in the District Court on the trial of the consolidated actions. (T. R. p. 284.)

ABSTRACT OF THE CASE.

The substance of the pleadings and the proceedings prior to the trial are set forth under the heading immediately preceding this one, and restatement of the same is omitted in the interest of brevity.

At the commencement of the trial (T. R. p. 46), it was stipulated that both policies were in full force

and effect at the time of the death of the deceased, and that proof of death was given, and that the claim was made that the cause of death was acute bronchial pneumonia caused by being bitten by a wood tick about the 31st of May, 1942, in an area that has reported Rocky Mountain spotted fever.

As the testimony of the witnesses does not appear in chronological order in the record, we shall, for the better understanding thereof, relate the evidence in narrative form.

Doctor Arthur Barr, the deceased, was a dentist, practicing his profession in San Rafael, Marin County, California, where he also resided. He resided in San Rafael with his wife and his two children. At the time of his death he had been married approximately 19 years. The evidence shows without conflict that he was a man of good habits, that he was devoted to his family, that he lived a healthy outdoor life and spent much of the time hunting and fishing. He was 52 years of age at the time of his death. Prior to the sudden onset of his fatal illness he was in excellent physical condition. His heart and blood pressure and his arteries were entirely normal. In 1930 or 1931 he was operated on for appendicitis and a hernia, but other than that he had never been attended by a physician during the entire period of his married life.

He was an indefatigable walker, covering as much as eight to 10 miles a day over hills and through brush. There is not a scintilla of evidence that he was suffering from any chronic or organic disorder that might have caused his death.

That he died of Rocky Mountain spotted fever caused by an infection brought on by a tick bite and from no other cause is not only fairly and reasonably deducible from the evidence but is the only inference that may reasonably be drawn therefrom.

On the 26th or 27th of May, 1942, the deceased in company with the witness Louis Nave, whom he had known for nearly 40 years, left San Rafael and went on a hunting trip in the vicinity of Ravendale, in the northeastern part of Lassen County. The antelope season opened on the 28th of May and the deceased and his companion hunted on that day and the two ensuing days. Each of the two men killed an antelope on the trip. After the animals were cleaned they were strapped on a horse and taken back to the ranch where the hunters were camping. The following day they were taken to Reno, Nevada, on a truck. On their arrival at Reno on May 31st the men went to an auto camp, where they proceeded to change clothes and take a shower. As the witness was putting his clothes on he saw two ticks fall off. The witness told Dr. Barr about the ticks, and the latter said, "Well, I had better take a shower, too. Maybe I have some on me." While the deceased was in the shower he called out to the witness, "I have two of them, too. I have one just above my navel." In response to a question by the Court the witness stated that he saw a tick on Dr. Barr about half an inch above the navel, buried in the skin. The tick was imbedded about half of its own length and the witness saw a red or pink spot around the point. This occurred about one o'clock in the after-

noon. About 9 o'clock that evening after the men had retired and were reading in bed the deceased said to the witness, "Look at my arms." The witness saw that Dr. Barr's arms were covered with red spots which looked like measles, and the witness said to the deceased, "What have you got, measles?" The following day Dr. Barr went fishing with another friend at Lake Tahoe, and later in the day the party left for home in the truck. He stated to the witness that on the following day he was going to get a medical examination, or, in his own words, "Maybe there might be something wrong with me. I will go down and get a checkup." The deceased thought that the spots on his wrists which looked like measles might be due to nervousness but he did not complain of feeling ill at any time on the way home. (T. R. pp. 49-101, *passim.*)

The deceased arrived at his home in San Rafael approximately 5 o'clock the same day, June 1, 1942. There he was met by his wife, the plaintiff, Zeila Barr, her mother Mrs. Grace Heydenfeldt, and Mrs. Gertrude Richardson, a family friend, all of whom testified that as the deceased was about to take a shower he pulled up his trousers and showed them a red rash on the back of his legs. (T. R. pp. 248-258, *passim.*) On the following morning, June 2, 1942, the deceased called at the office of Dr. LeRoy H. Briggs, a San Francisco physician, stating that he had recently returned from a hunting trip and wanted to be looked over. He made no complaint except that "on the way up" he had had some pain in his back and he was apparently somewhat concerned over fear of heart

disease. Dr. Briggs subjected him to a thorough physical examination and found that he was normal in all particulars and was "perfectly healthy". His heart, blood pressure, arteries and lungs were normal. The doctor noted that he was a healthy looking man, with a face flushed from exposure to the sun, and was well nourished and well developed. He had no symptoms of any illness. This was on Tuesday afternoon. On Saturday morning he was dead. Dr. Briggs testified that it would have been entirely possible for the deceased to have been in the incubation stage of an infection without any clinical manifestation. In virus infections the incubation period is not uniform.

On the morning of the day when the deceased paid the visit to Dr. Briggs he stated to his wife that he was going to San Francisco to buy some new clothes and that he wanted a "check-up" by Dr. Briggs. He did not state at that time that he was ill. When the deceased came home that evening after the examination he informed his wife that the doctor had told him he was a perfect physical specimen for a man of his age and he was laughing and joking. The following day he went to his dental office in San Rafael in the morning. When he returned home that evening he complained of not feeling well and did not touch his supper. "He just pushed everything to a side." His wife noticed that his face was flushed and very red. On the following morning, which was Thursday, June 4th, Dr. Barr did not arise at his accustomed hour. When he did not come downstairs for breakfast his wife went upstairs to investigate and found that he

was very sick. She describes his face as terribly red and his answers were incoherent. She immediately summonded Dr. Homer E. Marston, the family physician, who came at once. To Dr. Marston the deceased stated that on the previous night he had felt some chills and had fever, and that on the previous day he had suffered from a continuous headache and had had some abdominal discomfort. Accordingly, he had come home early, had taken a cathartic and had gone to bed. He complained that the headache had become more severe, as well as the chills and fever, and that he ached all over his body. The patient also stated that his mind was somewhat confused, and that he had passed a very uneasy night, sleeping at very short intervals. He also complained of a dryness of the mouth. He also stated that he had gone hunting for antelope in Lassen County on May 27th, remaining there until May 31st, and that on the last-mentioned day he had noticed a tick on his abdomen which had been removed by the witness Nave. Dr. Marston found some slight cyanosis of the skin and the patient was somewhat confused mentally. There were also herpes or fever blisters on his lips and his abdomen was tympanitic, or distended with gas. Returning at 5:30 in the afternoon, Dr. Marston found his patient very restless and in extreme pain, and ordered his removal to the Cottage Hospital in San Rafael where special nurses were placed on the case and the patient given fluids intravenously and morphine for his pain. By eight o'clock in the morning the pain had increased, the temperature had risen to 104, the pulse to 130, respiration 30. Certain plood specimens and a spinal

puncture were negative. X-rays revealed numerous areas of consolidation through the right lung and along the main stem bronchus in the left lung, and the heart showed a well marked lack of muscle tone. The conclusions of the doctors and of the roentgenologist were that the patient was suffering from widespread pneumonia of the influenzial type. During the day the patient became progressively worse, and about eight o'clock that evening lapsed into unconsciousness. By that time he was very cyanotic and his respiration so labored that he was placed in an oxygen tent. None of these methods or means of therapy did any good and Dr. Barr expired the following morning, June 6th, at 4:25 A.M. The Doctor further testified, "The diagnosis was acute bronchial pneumonia, cause unknown. (T. R. p. 214.) On the 12th of June a blood specimen was sent to the Bureau of Laboratories at Berkeley, and an examination made by a Dr. Eaton, and they made blood tests of this blood serum and agglutination tests for plague, tularemia and six strains of proteus, which were reported on the 15th to me as all negative. I reported this to the State Board of Health. I don't remember whether I reported it by phone or by mail. That was before Dr. Barr's death. I said that there had been a tick bite and of course I was not sure of my diagnosis. I did not know the exact cause of death outside of the bronchial pneumonia. I was present at the autopsy, which took place in Keaton's Undertaking Parlor in San Rafael on June 9, 1942. There were several other doctors present. I made a gross examination, or gross observations, while the autopsy was being performed. It

showed patches of consolidation in both lungs. (T. R. p. 215.) I have formed an opinion as to what relationship the tick bite bears to this case and to the terminal cause of death, bronchial pneumonia. **I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite. I did see a few pink spots on the left arm or shoulder. I don't remember how many,** but the pathologist called attention to these few pink spots in that region. They appeared to be petechial spots. Chills, fever, headache, abdominal discomfort, in addition to the history of a tick bite, are symptoms which they have in Rocky Mountain spotted fever. That would be the symptoms I would expect to find in a patient who related that he had been bitten by a tick which I suspected to carry Rocky Mountain spotted fever. (T. R. pp. 215-217.) I have testified that on the same day I found he was suffering from aches and pains all over his body, that he was cyanotic, that he was confused mentally, had herpes of the lips, his tongue was dry and coated, his abdomen was swollen, his temperature was 102, pulse 120, and his respiration 20,—all of those were symptoms which are usually found in Rocky Mountain spotted fever cases. Those are the things that I would expect to find in a Rocky Mountain spotted fever case, at that stage of the case. I sent these blood specimens, together with the fluid taken in the spinal puncture, to various laboratories for examination. They were nega-

tive. There is nothing conclusive about the fact that those examinations were negative. It is a common occurrence or experience in taking blood tests not only in Rocky Mountain spotted fever but in many other fevers that such tests result negatively. In the early stages of Rocky Mountain spotted fever, blood tests are not entirely relied upon. On the afternoon of June 4th the deceased was very uncooperative, and when you asked him to do things he didn't seem to understand what you were trying to get at. He wouldn't take nourishment. He was trying to get out of bed. (T. R. p. 219.) In fact, we had to have two nurses in there at one time because he just didn't seem to know what he was doing. He was in delirium. He was delirious when we brought him to the hospital. At 4:30 in the afternoon he was definitely delirious. He never came out of this delirium until his death the following Saturday morning. In addition to the other things, he was shouting and yelling very loudly. I said that on that afternoon about 5:30 I found him markedly confused, restless, dehydrated, extreme pain all over his body—those are the symptoms I would expect to find in a Rocky Mountain spotted fever case at that stage. **All the symptoms as I have related them and his actions were indicative of Rocky Mountain spotted fever throughout the time I had him under observation.** (T. H. p. 220.) I had not noticed the petechial spots that I saw on his arm at the time of his death during his lifetime. I looked for a rash or petechial spots during his lifetime but I did not notice any. The morning Dr. Reed was there, there was just a faint flushing of the skin, a redness of the upper part of his

back. That was the only change that we saw. It is a medical fact that where the onset of such a disease as Rocky Mountain spotted fever is as sudden as in this case, the prosecution is so fast or swift and death ensues within such a short time that rashes do not always occur. **There have been cases where no rash has ever been found and where it was definitely Rocky Mountain spotted fever.**" (T. R. p. 221.)

On the day of the autopsy, or the previous day, Mrs. Barr found a tick on Dr. Barr's clothes. She delivered it to her brother-in-law, Keith R. Ferguson, who in turn delivered it to Dr. Moody.

The tick was of the species known as the Dermacentor andersoni, a notorious carrier of Rocky Mountain spotted fever, which subsists upon animal blood and fastens itself upon human beings. Its chief habitat is in the Bitter Root Mountains which form a natural barrier between the States of Montana and Idaho, but it is found in the Sierra Nevada Mountains, and is particularly numerous in Lassen County. The testimony shows that it is frequently found on antelope, deer and other wild game in that locality.

That this particular species of tick transmits the spotted fever is well recognized by the medical authorities. The American Illustrated Medical Dictionary (W. B. Saunders Co., 19th Ed., 1941), contains the following definitions:

"**Rocky Mountain Spotted Fever:**

An infectious disease of the regions of the Rocky Mountains, characterized by high fever, pains in the bones and muscles, headache, a red, spotted

eruption which may become dark and confluent, and by mental symptoms. Probably caused by a blood parasite (Dermacentroxenus Rickettsii) which is transmitted by the ticks, Dermacentor andersoni (venustus), the American dog tick, Dermacentor variabilis, and the rabbit tick, Haemaphysalis leporispalustris. Diseases resembling Rocky Mountain spotted fever exist in other parts of the United States and of the World. An Eastern form occurs over eastern United States; it is transmitted by Dermacentor variabilis.

"**Dermacentor Fever:**

A genus of ticks. D. andersoni, a handsome reddish-brown species of wood tick which is responsible for transmitting Rocky Mountain spotted fever to man and for causing **tick paralysis** and **tularemia**. Its first and second hosts are rodents, especially squirrels, while its third hosts are domestic animals and man."

In the edition of "Life" of September 7, 1942 (p. 92) there is a full page photograph, many times magnified, of both the male and female Dermacentors Andersoni, and at page 93 the following article appears:

"**Rocky Mountain Spotted Fever.**

U. S. vaccinates 200,000 against tick disease.

There has been more Rocky Mountain spotted fever in more localities in the country this year than ever before. This is both because the fever is spreading over the country and because doctors are learning to recognize it. Scientists are girding themselves for a widespread fight against this ferocious fatal disease.

Center of the bitter battle is peaceful Bitter Root Valley in western Montana, where the disease was first identified by U. S. Public Health Service doctors. At Hamilton, in the country's most dangerous laboratory, they have found a preventive vaccine which is 75% effective. Once an unvaccinated person gets the disease he is fated to die unless his own body can throw off the infection. Only hope is a new serum which may save some lives otherwise doomed.

For years before the scientists came, people had sickened mysteriously in the valley, burned with sudden fever, flamed with red-purple rash and died. The farmers said it was from drinking melted snow-water. But the medical detectives found it was a virus transmitted to many by a little bloodsucking insect—the tick.

Several species of tick carry the virus in their bodies. But the **Dermacentor andersoni** carries the most virulent or 'hot strain' of those so far discovered. To reproduce, ticks must have blood. After lying low in the shrubbery they suddenly emerge in the spring, climb up on a blade of grass or twig and wave their legs in the air to catch on any passing mammal. Once they find a piece of live flesh, they bore under the skin and suck blood. When they feed on man, he does not feel their bite. As their host, other animals shown no symptoms of disease.

Male tick gets enough blood in three days, but female hangs on until she is engorged, usually at least ten days. As she feeds, she either draws virus from an infected animal or deposits her own in its bloodstream. When full, she drops to the ground, lays her eggs and dies. Baby ticks hatch

> out in a month, each one carrying spotted-fever virus, and the cycle of tick to animal to tick to man starts over again."

The article is accompanied by other illustrations, pages 94 to 97, showing the manner in which these ticks are collected and ground up to make vaccine with which human beings are inoculated against the disease.

In the June, 1944, edition of *Squibb Memoranda,* a magazine published by the medical department of E. R. Squibb & Sons, 475 Fifth Avenue, New York, practically the entire issue is devoted to disease-carrying ticks, and the diseases which they transmit from animals to human beings. The various articles are illustrated with maps showing the locales of the different diseases transmitted by these pests, together with diagrams and enlarged photographs, both of the known breeds of ticks and of the disease germs which they carry. As it is manifestly inconvenient, if not impossible, to reproduce these illustrations in this brief, we shall, if we are able to obtain them, file a sufficient number of copies of each of these magazines with the clerk for examination by the Court.

The first article in the Squibb publication is a biography of Dr. John F. Anderson of the United States Public Health Service, whose research in 1903 led to the discovery of the tick as the vector of Rocky Mountain Spotted Fever, and after whom the **dermacentor andersoni,** the tick involved in the instant case, was named. There follows an article on typhus fever, a disease similar to spotted fever, but usually transmitted by the body louse or the flea. We mention this

article because it contains a description of Rickettsia, an organism named after Dr. Ricketts, its discoverer, which are present in the blood of infected men, animals and lice, and which are frequently mentioned in the medical testimony in the case at bar. Following the article on typhus there is another entitled, "Ticks as Vectors of Disease." It is there stated *inter alia:*

> "The most virulent of the tick-borne, rickettsial diseases in the United States is Rocky Mountain spotted fever."

There follows this article another, entitled, "Rocky Mountain Spotted Fever". This is illustrated with maps, one of the globe, showing the geographical distribution of rickettsial diseases, other than true typhus fever; the other a map of the United States alone, showing the distribution of Rocky Mountain Spotted Fever by counties. We print the treatise in full in the margin.*

---

*"**Rocky Mountain Spotted Fever.** At the turn of the century Rocky Mountain Spotted Fever was known only in western Montana and southern Idaho. In the spring of 1902, Wilson and Chowning of the University of Minnesota, investigated this disease in the Bitter Root Valley of Montana. They furnished evidence that the disease is not contagious, and they concluded that it apparently is transmitted by a tick, for several reasons, chief of which were the seasonal distribution, the sharply limited sites of occurrence, and the history of tick bite given by every patient.

"On April 22, 1903, Doctor John F. Anderson, who was then Passed Assistant Surgeon and Assistant Director of the Hygienic Laboratory, United States Public Health and Marine-Hospital Service, was instructed to proceed to Montana to investigate spotted fever. As a result of his investigation, a bulletin entitled 'Spotted Fever (Tick Fever) of the Rocky Mountains: A New Disease' was published in July 1903 by the Government Printing Office.

"The disease had been known in the valley of the Bitter Root river in western Montana for about twenty years. It was sharply

It will be apparent at once from the testimony of Dr. Marston that the deceased, both from the clinical history of the case and the symptoms, such as the rash, the high fever and the cyanosis, was suffering from Rock Mountain spotted fever, which developed into pneumonia, which latter disease was the ter-

---

localized on the west bank; cases occurred on the east bank only in persons who had visited the west side. Anderson found that it was not confined to the Bitter Root Valley but had been known clinically in Idaho for many years, cases also being reported in Nevada, Wyoming and eastern Oregon.

"For more than twenty years thereafter, Rocky Mountain spotted fever was believed to be confined to the northwestern states. However, with the passage of time cases were reported from other western states, and in 1930 its existence in the Alleghanies was established. Today there are only six states from which it has not been reported—Maine, Vermont, Rhode Island, Connecticut, Michigan and Kansas. It is often referred to as being of two types, western and eastern. However, it is doubtful if this differentiation is justified. While it is true that the tick vectors in the East and West are different species of the genus Dermacentor, yet the infections transmitted by them are completely identical immunologically and there are no essential clinical or pathologic differences either in man or in experimental animals.

"Anderson reported that Rocky Mountain spotted fever prevailed exclusively in spring and early summer. This seasonal occurrence is now accepted, and known to be due to the active period in the life of the tick vector. In the western states the majority of cases occur in April, May and June; in the eastern states, in June, July and August.

"Anderson also reported that the fever was not contagious because it never occurred in two persons in the same family during any one season. It did develop in persons exposed to the bite of ticks, such as stockmen, sheep herders, miners, ranchmen and others whose duties took them into the brush. In the West it still occurs chiefly in men engaged in outdoor occupations; in the East, because the common dog tick is the natural vector, it quite frequently attacks women and children.

"In 1902 Wilson and Chowning had searched for the parasite causing spotted fever but their attempts and those undertaken in 1903 by Anderson were unsuccessful. Not until many years later was the organism identified as belonging to a new group, the rickettsiae; specifically, it is *Rickettsia rickettsi* (*Dermacentroxenus rickettsi*). (For further discussion of rickettsiae, see page 8.)

"Transmission. Study of the patient's history always revealed a tick bite about one week before onset of Rocky Mountain spotted

minal cause of death. (T. R. p. 216.) The testimony of Dr. Briggs, who examined the deceased on June 2, 1942, is to the following effect:

> "Knowing that he was perfectly healthy on Tuesday afternoon and that he was dead on Saturday morning, I would say that it was possible for him to be healthy as far as any ill sign went

---

fever. Anderson was therefore led to the belief that ticks were necessary for the transmission of the disease, although he noted that carefully controlled experiments would have to be made before this conclusion became definite. He wrote:

" 'The life history of the organisms of malaria and Texas fever naturally suggested that some insect was concerned in the transmission of the disease. On investigation it was found that the ticks appeared in the valley about the last of February, but were inactive until the middle of March or first of April, the first cases of fever appearing about the last of March. The ticks began to diminish greatly in number from about June 1, and after the middle of July very few were seen; the cases of fever also begin to diminish about June 1, the latest date on which the disease has been known to occur being July 20.'

"It was found that the ticks prevailing in the Bitter Root Valley belonged to the genus *Dermacentor* but differed from the *Dermacentor variabilis,* the common dog tick of the eastern states. Specimens were forwarded by Anderson to Charles Wardell Stiles, Zoologist in the United States Public Health Service, who identified them as a new species and, in recognition of the contribution of Doctor Anderson, named it *Dermacentor andersoni.* However, proof that the tick was the vector was not obtained until 1906 when Ricketts effected transmission of the etiologic agent from guinea pig to guinea pig by the *Dermacentor andersoni.* At the time he thought he was working with *Dermacentor occidentalis,* a tick which is an effective laboratory transmitting agent and is probably a vector in nature but has never been found naturally infected. *Dermacentor andersoni* is now known to be the chief agent transmitting the Rocky Mountain spotted fever parasite to man in the western states, *Dermacentor variabilis* being the common vector in the eastern and central states. Recently another tick, *Amblyomma americanum,* has been proved to be a transmitting agent along with *Dermacentor variabilis.* This species occurs in the southeastern and southcentral states.

"Symptomatology. Parker (United States Public Health Service) has described the clinical picture. The usual ambulatory patient has low fever, scanty rash and very slight malaise. In fulminating cases the rash, if present at all, coalesces and forms

on Tuesday and still be in the incubation stage of some disease. A man could be in an incubation period of pneumonia, or of any of the acute infections, and if he had a normal temperature there would be no way by which you could tell. He had no specific complaints except this backache which he had, which is a very frequent sign of infection and which he had had some 10

---

ecchymotic blotches; evidence of central nervous system involvment appears early; and death occurs in three to five days.

"The incubation period is two to five days in the more severe infections and three to fourteen in milder ones with, possibly, a prodromal period of two to three days characterized by anorexia, irritability, malaise and chills. The symptoms most often noted at onset are frontal and occipital headache, intense aching in the lumbar region and marked malaise. Other manifestations are sweating, injection of conjunctivae, photophobia, pain in abdomen, bones and muscles, nosebleed, nausea, vomiting, an apprehensive expression and cyanosis.

"The rash usually appears on the second to fourth day but may be delayed until the sixth. It is most frequently observed first on the wrists and ankles, less commonly on the back. At the beginning it is pale to bright rose and commonly macular but sometimes papular. It extends rapidly to most of the body but is usually less marked on the abdomen and face. At first the color disappears on pressure; later it does not, the skin becoming darker and bluish. Large, scattered, bright spots indicate a better prognosis; small, dark, dense areas denote more severe infection.

"The febrile period is usually two to three weeks. In milder infections fever increases slowly to a possible maximum of 103° F. In fatal types it rises more rapidly to a maximum of 104° to 106°. Morning remissions are frequent. The maximum temperature usually persists for about two weeks and falls by lysis. The pulse is full and strong at first, and may not exceed 90 a minute in less toxic patients; in more toxic patients it may become shallow and range from 110 to 160.

"Diagnosis. Anderson called attention to the fact that clinically typhoid fever closely resembles spotted fever but that differential diagnosis is easy because of the characteristic rose spots, diarrhea, Widal reaction and presence of typhoid bacilli in the blood in typhoid fever. He wrote that spotted fever more closely resembles typhus than any other disease and that cases of typhus fever occurring in a locality where spotted fever prevailed would 'without a blood examination and close bedside observation, cause much trouble in diagnosis.' Differentiation from typhus fever

days before. By a specific infection we mean an infection that is due to a definitely known cause, like the typhoid bacillus or the pneumococcus, or one of the virus diseases. There is usually a period of varying length from the time the individual gets the noxious agent of pneumococcus or the typhoid bacillus—the particular virus—until the time that it becomes in sufficient quan-

---

would be made because of the longer period of incubation in typhus, absence of history of tick bite, appearance of the eruption on the abdomen and chest first with later extension to the extremities, and prevalence throughout the winter.

"The years since 1903 have naturally brought developments in laboratory diagnosis of diseases of this type. They have not, however, been especially helpful in spotted fever because specific findings occur rather late in the course of the disease. The Weil-Felix test becomes positive in about ten days and rises continually for some days thereafter, but this is not helpful in differentiation from typhus because the test is also positive in the latter disease. The transmission test, or infection test, made in guinea pigs, may require several animal passages and therefore is of limited assistance. Protection tests in guinea pigs require facilities not generally available. A specific complement fixation test has recently been devised; it becomes positive about the tenth day and may remain positive for years, and gives promise of becoming a useful means of differentiating Rocky Mountain spotted fever from typhus fever.

"Therapy and Prophylaxix. Treatment in 1903 was symptomatic and it is still limited to general supportive measures. The sulfonamides have been tried but found to be not only useless but actually contraindicated. There is also evidence that intravenous therapy is dangerous regardless of the drug used. Experimentally tyrothricin has not proved effective. Penicillin is not likely to be used in view of the fact that the rickettsia is gram-negative.

"Measures to protect against tick bite in persons compelled to work in tick infested territory, such as protective clothing, are helpful.

"Topping (United States Public Health Service) has reported experience with an immune serum produced in rabbits by the use of live virus. As a result of observation in fifty-two human cases, he concludes that this serum may offer hope in the treatment of Rocky Mountain spotted fever, particularly if administered early in its course.

"Protective vaccination by means of a phenol-formalized emulsion of ground-up infected ticks (*Dermacentor andersoni*) was

tity to give the person symptoms. A person could have some sort of a disease and still a doctor wouldn't know until a certain stage had been reached. That is true of a common cold. It is true of practically all infections. (T. R. p. 69.) * * * A condition of infection in some diseases, particularly pneumonias, may precede the existence of any clinical signs. I think that is true of nearly

---

first used in 1924 by Spencer and Parker. According to Parker, only 64 of 15,000 persons vaccinated in an endemic area developed spotted fever. In 1941 Parker reported results of fifteen years' experience with the vaccine; it appeared to have definite immunizing value, protecting for about a year, at the end of which time the individual could be re-immunized. A vaccine is now available which is prepared by growing the rickettsiae in yolk sacs of fertile hen's eggs according to the method of Cox. Widespread use of vaccine is not considered advisable but restricted use is advocated in persons living or working in areas where exposure to infected ticks is reasonably certain.

"Bibliography:

Wilson, L. B., and Chowning, W. M.: J.A.M.A. 39:131, 1902.

Anderson, John F.: Spotted Fever (Tick Fever) of the Rocky Mountains: A New Disease. Gov. Printing Off., Washington, 1903.

Ricketts, H. T.: J.A.M.A. 47:358, 1906.

Parker, R. R.: J.A.M.A. 110:1185, 1273, 1938.

Topping, N. H.: Pub. Health Rep. 58:757, 1943.

Parker, R. R.: Am. J. Trop. Med. 21:369, 1941.

"Summary:

"(1) In 1902 and 1903 Rocky Mountain spotted fever in Montana and Idaho was investigated and found to be probably transmitted by ticks and related to typhus fever.

"(2) Rocky Mountain spotted fever is a rickettsial disease caused by Rickettsia rickettsi. It has been reported from almost every state in the Union. In the West the chief vector is the wood tick, *Dermacentor andersoni,* and in the East it is the common dog tick *Dermacentor variabilis.*

"(3) The disease is characterized by a fever which usually persists for two to three weeks and terminates by lysis, and by an eruption which appears first on the wrists and ankles and then spreads along the limbs and to the back and chest, fading with defervescence:

"(4) Differential diagnosis is by symptomatology, history of tick bite, an occurrence during a definite season. Treatment is symptomatic. Protective immunization is available for persons exposed to the bite of infected ticks."

every infection. It is what we speak of as the incubation period. The incubation period is not uniform. I did not specify as to any length of time. I would say the usual incubation period of the ordinary diseases is from a day to a month. My answer would be 'no' to the question that in virus pneumonias the picture of the chest disclosed by the X-ray is far in advance of any symptoms that are shown externally by the patient or on examination with a stethoscope. I think what you are trying to get at is that the picture given by the X-ray is more marked than the signs are elicited in the examination of the chest. The man would not have had a normal temperature had he had a virus pneumonia. He does not have a pneumonia in the incubation period. (T. R. p. 77.)"

The rest of the testimony produced at the trial needs no extensive discussion, as it is entirely of that uncertain and unsatisfactory nature which commonly characterizes the testimony of doctors and pathologists. Certain blood specimens of the deceased taken on June 4 or June 5 were examined on June 12 by Malcolm H. Merrill, Chief of the Division of Laboratories of the California State Health Department. The material portion of his testimony is as follows:

"I stated we tested the serum from this blood with agglutination against known bacterial suspensions. We did not get any positive results of any kind or character. Our tests were directed only against those three conditions, and we had no evidence that any of those three were present. We looked for no other agents as that in the blood culture and we found no other organisms. If there had been an organism such as an outside

organism or something of that sort it should have shown up in the culture. I could hardly say that any other organism that I regard as infectious or which might result in death should have shown up in the culture, because the culture technique used would not support the growth of all pathogenic organisms. (T. R. p. 112.) I would say the investigation would have supported a determination with respect to some pathogenic organisms in addition to the three I mentioned specifically. I found none of these. I think it is safe to say as far as my determination was concerned I found nothing that would indicate the cause of death. I am engaged very often in making laboratory determinations concerning blood specimens. The information we had was that the blood specimens in this case were taken within a day or two after the onset of the disease. (T. R. p. 113.) With some of the procedures that we use, we would expect a positive reaction in a specimen which is taken a day or two after the onset of the disease. I refer in that connection to cultures and the animals inoculations. There are varying factors: The factor of time in the disease is the important one, of course. There would be variations as the disease progresses. (T. R. p. 114.) I mean we would expect to find organisms in the bloodstream at certain stages of the disease, and not at others. In Rocky Mountain spotted fever we would expect to find organisms in the bloodstream the first week of infection—as soon as the acute symptoms begin. By 'acute symptoms' I mean as soon as the man really gets ill. There isn't anything absolute, of course, in it. But I say in general we would expect to find the organisms present early in the infection. Similar tests had been

made in the laboratory. I have supervised tests on tularemia and plague, but not specifically in previous instances on Rocky Mountain spotted fever. The condition in which the blood is kept in the interim between the taking of the whole specimen and the receipt of that specimen and the performance of the experiment by ourselves have an influence on the accuracy of the determination. (T. R. p. 116.) There is not only the question of temperature; there is the question of time. In general, the lower the temperature the longer the agent will survive. The organisms must have viability. In other words, life. Time enters into the question as to whether they do or do not have life. The interval elapsing would have an influence regardless of what that interval is. The organisms tend to die out after the specimen is taken. Whether I would regard seven or eight days as a rather considerable interval elapsing between the taking of the specimen originally from the subject and the beginning of the performance of my experiments or demonstrations as an unusual length of time would depend upon how the specimen is taken and how the specimen is kept. Keeping in mind that this specimen was kept in a refrigerator, the lapse of seven or eight days would have an influence on the possibility of success in my tests. (T. R. p. 117.) After the lapse of that length of time, even though the specimen was kept in a refrigerator the organisms might not be viable, but on the other hand, they might be. I have no way of determining that but by the experience of others who have done a similar type of work. Experiments could be devised to demonstrate the rate of loss of viability of a blood specimen with time. **Nothing was done in that**

regard with this case because we received the blood date, that is, after the time interval I have mentioned. (T. R. p. 118.) It is pretty difficult in a diagnostic test to say that any test is conclusive. I would have to answer 'No' to your question as to whether I would regard the tests which I made as a conclusive determination as to whether they were or were not the organisms of anything I was looking for in the blood in this case. (T. R. p. 120.)"

The Director of the Research Laboratory of the State Department of Public Health, the witness Monroe D. Eaton, testified that he had made some experiments with a part of the same specimen of the blood of the deceased by inoculating four cotton-rats, by methods needless to be discussed in detail. The pertinent portions of his testimony may be summarized as follows:

"The results of my infection of the rats were entirely negative. The pathology was that of a virus pneumonia. (T. R. p. 135.) It is awfully hard to state this without using technical language. The character of the exudate in the lungs and the cellulary action around the bronchi and blood vessels was very much the same as that which we see in other cases of virus pneumonia. We saw no bodies which we could identify positively. We saw no rickettsial-like bodies. I think the pathology was very suggestive. It was very definite that the man had a pneumonia, probably due to virus;—a virus is defined in the dictionary as a harmful or noxious agent. The term generally means a submicroscopical organ-

ism which is not cultivated in the ordinary media used for the demonstration of bacteria. I did not regard my investigation and tests with the rats as conclusive because we did not have proper specimens for this sort of a test. We were interested in the case because it was reported as a virus pneumonia. We used these animals to demonstrate one of the agents which we believe caused virus pneumonia. Blood is not the proper specimen to use for these tests. We should have had sputum, or specimens of fresh lung tissue, which we did not have. (T. R. p. 136.) We knew that the specimens or sections of lung that were taken and submitted to us in this case showed evidence that the body had been embalmed before sections or specimens were taken. We should have fresh lung tissue for the purpose of isolating the causative agent. We did no animal inoculation with the lung tissue because of the fact that the body was embalmed and therefore any evidence that would be in there would be dead and not transmissible to the animals which we inoculated. When I speak about the examination that I made of the lung tissue, I am speaking about microscopic examination."

On cross-examination, the same witness testified:

"The inoculation which I made in the cotton-rats was partly for typhus and unusual rickettsial strains; partly because the cotton-rat, according to some of our previous experiments, is susceptible to the agent which causes virus pneumonia or primary atypical pneumonia. The result of my inoculation experiments was negative. That was the result that I would ordinarily expect to get,

as far as I know, from a virus pneumonia case. Ordinarily the agent does not occur in the blood, or, of so, only transiently in some forms of virus pneumonia. A virus is an organism which is not visible under the microscope; that is the definition that is generally used. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically. We did not see any rickettsial bodies in our examination of tissues from Dr. Barr's body. We are not expert in doing that, however. I did not find the pathology and the specimens from Dr. Barr to differ essentially from those specimens which I examine in the ordinary rapidly fatal case of virus pneumonia. From my observations and experiments, there was nothing which prompted me to believe that the cause of the pneumonia was rickettsial in nature." (T. R. pp. 137-139.)

On redirect examination, the witness testified:

"I was looking for rickettsia in the light of the history of the case. That is one of the reasons we sent the blood to Dr. Merrill for guinea pig inoculations. (T. R. p. 139.) We were not specifically looking for rickettsia in this case. We always look for bodies in a plasma of this large amount of nuclear cells which you see in the lungs of these cases, either rickettsia or other virus bodies. There haven't been any cases of Rocky Mountain spotted fever that die in two or three days with a pneumonia of this type. **I have gone into the question of how frequently pneumonia occurs in rickettsial diseases. In rickettsial diseases pneumonia occurs very, very often after the disease is full blown * * * the pneu-**

monia is not necessarily due to the rickettsial disease. It may be a secondary bacterial infection. I said all pneumonia from which people die following rickettsial infections, like typhus and spotted fever, may be due to bacteria other than rickettsial diseases. * * * You are correct in stating that the infectious tick transmits the rickettsia to the bloodstream of the human being upon which it feeds. That rickettsia is carried through the bloodstream and lodges some place in the body. It is not necessarily a fact that a germ will usually attack a weak spot in a human being. Pneumonia is due to the weakened condition of the patient. I would not say that that is evidence that the rickettsia invades the lungs. In these cases people die quite frequently of pneumonia." (T. R. pp. 139-141.)

Dr. Karl F. Meyer, Director of the Hooper Foundation of Medical Research of the University of California and Professor of Bacteriology, testified that in June 1942, with Drs. Rusk and Moody, he made an examination of specimens of the lung tissue of Dr. Barr. He state:

"I recognized in certain patches of the lung sacs peculiar bodies which I could not identify with the eosin-hematoxylin stain. * * * You couldn't say that there were bodies in those sections or specimens other than virus. An elementary body—the term is used to express a corpuscular element which is within the cytoplasm nucleus of a cell. Now, whether that is produced by a virus or is a virus itself—that is naturally a matter which cannot be decided without experimental tests. The microscope in this

respect is merely a tool to lead you in certain directions as to what you should do. If there were rickettsia present in those specimens, you might find clusters of coccoid, broad-shaped elements, which I want to put into the record are very difficult to stain, and you have to use special staining methods to do that. In fact, to be perfectly frank, some people have extreme difficulty in demonstrating rickettsial bodies in sections, because there are layers upon layers of cells. In other words, instead of having one thin film of cells you have two or three layers of cells on top of it because you can only count two or three. There were elementary bodies in the cytoplasm. Some of them naturally were in small aggregates. If I found rickettsia I would expect to see them in aggregates. An elementary body in many cases could be said it was rickettsial-like, but that is naturally a question of terminology. **I knew the body had been embalmed. That added an obstacle to my eventual determination. Considering this tissue had come from a body which had been embalmed, I wouldn't commit myself on whether the bodies that I saw were rickettsia or elementary bodies. They could be rickettsia or they could be other bodies.''** (T. R. pp. 150-156.)

No further testimony need be referred to, as we have set forth enough to sufficiently fortify the argument of appellants.

ASSIGNMENT OF ERRORS.

1. The District Court erred in granting the motions of each of the appellees for a dismissal under the provisions of Rule 41-b of the Rules of Civil Procedure for the District Courts of the United States. (T. R. pp. 34, 272, *et seq.*)

2. The said District Court erred in stating that the said motions were meritorious and that upon the facts and the law plaintiffs had shown no right to relief. (T. R. pp. 273, *et seq.*)

3. The evidence introduced and received upon the trial of the cause established *prima facie* the right of plaintiffs to judgment as prayed for in their complaints in each of these actions.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Federal Courts Follow the State Law in Cases Commenced in or Removed to Them Because of Diversity of Citizenship, and, Therefore, it Was the Duty of the Trial Judge, in Passing Upon the Motions to Dismiss for Failure of Proof, to Follow the Law of the State of California as to Dismissals or Nonsuits for Failure of the Plaintiff to Prove His Case. Under the Law of the State of California, a Nonsuit May be Granted Only Where There is No Evidence Which Either Directly or by Reasonable Inference Tends to Support the Plaintiff's Case. In the Case at Bar, There Was Evidence Amply Sufficient to Have Warranted an Inference that the Deceased Met His Death by

Reason of an Infection Caused by the Tick-Bite, and the Trial Judge, Therefore, Erred in Granting the Motions of Defendants.

I.

UNDER THE LAW OF THE STATE OF CALIFORNIA, A NONSUIT CAN BE GRANTED ONLY WHERE THERE IS NO EVIDENCE FROM WHICH THE COURT OR JURY COULD DRAW A REASONABLE INFERENCE THAT THE PLAINTIFF IS ENTITLED TO RECOVER.

In matters of general as well as local law, the Federal Courts follow the law of the state in which the federal district is located.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 114 A.L.R. 1487.

In cases commenced in the Federal Court because of diversity of citizenship, or removed from state to Federal Courts for the same reason, the state law is followed by the Federal Courts.

Meredith v. Winterhaven, 8 L. ed. 1;
Brown v. Beck, 63 Cal. App. 686, 220 Pac. 14;
Miller v. Director General of Railroads, 270 Pa. 330, 113 Atl. 373.

In *Erie R.R. Co. v. Tompkins,* supra, the Supreme Court of the United States, overruling the earlier case of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, held that in an action in the Federal Court for the Southern District of New York brought by the plaintiff, who was a citizen of Pennsylvania, for injuries received by reason of the negligence of the defendant

railroad company in the latter state, it was the duty of the Federal Court to follow the common law of Pennsylvania as declared by its highest Court. The Court quotes with approval *Hawkins v. Barney,* 5 Pet. 457, 464, 8 L. ed. 190, 193, in which it is said that Section 34 of the Federal Judiciary Act of 1789

> "has been uniformly held to be no more than a declaration of what the law would have been without it, that the *lex loci* must be the governing rule of private right **under whatever jurisdiction private right comes to be examined.**"

Even without *Erie R.R. Co. v. Tompkins,* it would have been the duty of the District Court in the instant case to have followed the law governing nonsuits as pronounced by the California decisions, because the Act of 1789 specifically provides:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The law governing the power of a trial Court to grant a nonsuit is well settled by the California decisions. A motion for a nonsuit involves the legal effect of admitted facts. (*Smith v. Superior Court,* 2 Cal. App. 529, 84 Pac. 54.) When made at the close of plaintiff's case, it in purpose and effect operates as a demurrer to the evidence, and must therefore assume that all the evidence in favor of the plaintiff, if relevant to the issues, is true. (*Butler v. Hyland,* 89 Cal. 575, 26 Pac. 1108; *In re Daly's Estate,* 15 Cal. App.

329, 114 Pac. 787; *Bush v. Wood,* 8 Cal. 647, 97 Pac. 709.)

In *Archibald Estate v. Matteson,* 5 Cal. App. 441, 90 Pac. 723, the Court says:

> "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading."

Therefore it is well settled that upon a motion for nonsuit all the evidence must be construed most strongly against the defendant. (*Gates v. Pendleton,* 184 Cal. 797, 195 Pac. 664; *Anderson v. Wickliffe,* 178 Cal. 120, 172 Pac. 381; *Rauer v. Hertweck,* 175 Cal. 278, 165 Pac. 946; *Marchetti v. So. Pac. Co.,* 204 Cal. 679, 269 Pac. 529; *Rabe v. Western Union Telegraph Co.,* 198 Cal. 290, 244 Pac. 1077; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Neblett v. Elliott,* 46 Cal. App. (2d) 294, 115 Pac. (2d) 872; *Easton v. Ash,* 18 Cal. (2d) 530, 116 Pac. (2d) 433.)

Every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced, must be considered as facts in favor of the plaintiff. (*Carter v. Canty,* 181 Cal. 749; *Smellie v. So. Pac. Co.,* 212 Cal. 540, 299 Pac. 529; *Hoffart v. Southern Pac. Co.,* 33 Cal. App. (2d) 591, 92 Pac. (2d) 436; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Hubbard v. Matson Navi-*

gation Co., 34 Cal. App. (2d) 475, 93 Pac. (2d) 846; *Rae v. California Equipment Co.,* 12 Cal. (2d) 563, 86 Pac. (2d) 352; *Dunlap v. Pacific Elec. Ry. Co.,* 12 Cal. App. (2d) 473, 55 Pac. (2d) 894; *Moffatt v. Buffums' Inc.,* 21 Cal. App. (2d) 371, 69 Pac. (2d) 424; *Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Wires v. Little,* 27 Cal. App. (2d) 240, 80 Pac. (2d) 1010, 82 Pac. (2d) 388; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Estate of Burre,* 38 Cal. App. (2d) 518, 101 Pac. (2d) 549; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *Laraway v. First National Bank of La Verne,* 39 Cal. App. (2d) 718, 104 Pac. (2d) 95; *Martin v. Tully,* 44 C.A. (2d) 226, 112 Pac. (2d) 282; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338; *Amendt v. Pacific Elect. Ry. Co.,* 46 C.A. (2d) 248, 115 Pac. (2d) 588; *Brewer v. Southern Pac. Co.,* 29 Cal. App. (2d) 251, 84 Pac. (2d) 230; *Boellaard v. Crabbe,* 41 C.A. (2d) 792, 107 Pac. (2d) 951.)

The Court must take the view of the evidence most favorable to the plaintiff. (*Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Moffatt v. Buffums' Inc.,* 21 Cal. App. (2d) 371, 69 Pac. (2d) 424; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *National Auto Ins. Co. v. Cunningham,* 41 C.A. (2d) 828, 107 Pac. (2d) 643; *Reiman v. Moore,* 42 C.A. (2d) 130, 108 Pac. (2d)

452; *Anderson v. Stump,* 42 C.A. (2d) 761, 109 Pac. (2d) 1027; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338.)

If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the Court must take the view most favorable to the plaintiff. All the evidence in favor of the plaintiff must be taken as true, and if contradictory evidence has been given, it must be disregarded. (*Russell v. Smith,* 12 Cal. App. (2d) 399, 55 Pac. (2d) 562; *Mitchell Camera Corp. v. Fox Film Corp.,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Hubbert v. Aztec Brewing Co.,* 26 Cal. App. (2d) 664, 80 Pac. (2d) 185, 1016; *Stone v. San Francisco,* 27 Cal. App. (2d) 34, 80 Pac. (2d) 175; *Wires v. Little,* 27 Cal. App. (2d) 240, 80 Pac. (2d) 1010, 82 Pac. (2d) 388; *Reiman v. Moore,* 30 Cal. App. (2d) 306, 86 Pac. (2d) 156; *Williams v. Freeman,* 35 Cal. App. (2d) 104, 94 Pac. (2d) 817; *Knecht v. Lombardo,* 33 Cal. App. (2d) 447, 91 Pac. (2d) 917; *Barnett v. La Mesa Post No. 282, American Legion,* 15 Cal. (2d) 191, 99 Pac. (2d) 650; *Slater v. Shell Oil Co.,* 39 Cal. App. (2d) 535, 103 Pac. (2d) 1043; *National Auto Ins. Co. v. Cunningham,* 41 C.A. (2d) 828, 107 Pac. (2d) 643; *Reiman v. Moore,* 42 C.A. (2d) 130, 108 Pac. (2d) 452; *Anderson v. Stump,* 42 C.A. (2d) 761, 109 Pac. (2d) 1027; *Darling v. Dreamland Bedding & Upholstering Co.,* 44 C.A. (2d) 253, 112 Pac. (2d) 338; *Neblett v. Elliott,* 46 C.A. (2d) 294, 115 P. (2d) 872.)

On such motion the Court has nothing to do with the credibility of the witnesses (*Knecht v. Lombardo,*

33 Cal. App. (2d) 447, 91 Pac. (2d) 917), nor with testimony tending to create a conflict (*Mitchell Camera Corporation v. Fox Film Corporation,* 8 Cal. (2d) 192, 64 Pac. (2d) 946; *Knecht v. Lombardo,* supra; *Darling v. Dreamland Bedding and Upholstering Co.,* supra; *Williams v. Freeman,* supra), and on a motion for a nonsuit the trial Court may not weigh the evidence. (*Estate of Cushing,* 30 Cal. App. (2d) 340, 86 Pac. (2d) 375.) The rules as to nonsuit are the same whether the trial is by the Court or by a jury. (*Freese v. Hibernia Savings and Loan Society,* 139 Cal. 392, 73 Pac. 172; *Grummert v. Fresno Glazed Cement Pipe Co.,* 181 Cal. at p. 512, 185 Pac. 388; *Goldstone v. Merchants' Ice Co.,* 123 Cal. 625, 56 Pac. 776; *Marron v. Marron,* 19 Cal. App. 326, 125 Pac. 914; *Hercules Oil Co. v. Hocknell,* 5 Cal. App. 702, 91 Pac. 341.) And when a motion is submitted to a Court, acting also as a jury, it is not for the Court to base its determination of the motion upon what it might do in dealing with the facts as a jury, but solely upon the proposition of whether the facts as proved make it a *prima facie* case. (*Archibald Estate v. Matteson,* 5 Cal. App. 441, 90 Pac. 723.)

The rule governing nonsuit enforced by the California courts of *dernier resort* is well settled by the late Justice Seawell in *Gregg v. Western Pacific R. R. Co.,* 193 Cal. 212, 216, 223 Pac. 523:

> "It is important to keep in mind from the outset the well-established rules of law which must control this court in determining whether or not the motion of nonsuit was properly granted. In so doing we must view with reasonable favor the

evidence offered in support of appellant's case. 'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If contradictory evidence has been given it must be discarded. (*Estate of Arnold,* 147 Cal. 583.) The plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiff's claim. (*Anderson v. Wickliffe,* 178 Cal. 120.) Evidence whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly 'against the defendant, and if the plaintiff has introduced proof sufficient to make out a *prima facie* case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied. (*Bush v. Wood,* 8 Cal. App. 647; *In re Daly,* 15 Cal. App. 329; *Wasserman v. Sloss,* 117 Cal. 425; *Hoff v. Los Angeles Pacific Co.,* 158 Cal. 596; *Lassen v. Southern Pac. Co.,* 173 Cal. 71; *Kleist v. Priem,* 51 Cal. App. 32.)' (*Berger v. Lane,* 190 Cal. 443.)"

II.

GIVING THE APPELLANTS THE BENEFIT OF EVERY FAVORABLE INFERENCE FAIRLY DEDUCIBLE FROM THE EVIDENCE, A PRIMA FACIE CASE WAS MADE, AND THE TRIAL COURT COMMITTED ERROR IN DENYING THE MOTION TO DISMISS.

We have heretofore reviewed at considerable length the evidence in the record which reasonably tends to show that the deceased came to his death from accidental, violent and external means; to-wit, from terminal pneumonia resulting from an infection produced by a tick-bite. It was proven beyond all cavil that the tick which was found embedded in the body of the deceased was of the *dermacentor andersoni* species, which is a notorious carrier of Rocky Mountain spotted fever.

It is true that the connection between the terminal pneumonia which was the immediate cause of death and the tick-bite is based upon the history of the case and the opinion of the medical witnesses. Of course, no one actually saw the infection taking place within the living body of the deceased. That would have been impossible. The cause of death, like any other fact in issue, may be proven by circumstantial evidence, and it would be difficult in such a case to imagine more convincing proof. Here we have a man in the prime of his life, an athlete, a man accustomed to outdoor life, strong and healthy in every particular. He goes on a hunting trip. He goes into a region where the animals which he was hunting were infested by this disease-carrying tick. On his return from the trip the deceased himself and his companion saw one

of these ticks embedded in his flesh, and removed it. He returns to his home still apparently in the best of health, and is examined by a doctor, who pronounced him physically fit in every particular. Four days later he was dead, having developed in the meantime all of the characteristic symptoms of Rocky Mountain spotted fever. The doctor who attended him gave it as his opinion that the virus pneumonia from which the decedent died was the result of the fever produced by the poison transmitted by the tick, which is a notorious vector of the disease. The proof of the cause of death in such cases must of necessity depend primarily upon three things: (1) the history of the case; (2) the manifested symptoms; and (3) the opinion of the physician. In the very nature of the case, no other proof is obtainable.

If the evidence in the case at bar is not sufficient to entitle the appellants to a recovery, then we say in all sincerity that many defendants in criminal cases have been unjustly executed or sent to prison on weaker evidence.

A typical case is *People v. Long,* 15 Cal. (2d) 590, 103 Pac. (2d) 969. The issue in that case, which was a prosecution for murder arising out of an abortion, was whether the operation was necessary to preserve the life of the deceased. Numerous physicians testified that the decedent was suffering from *mitral stenosis,* a valvular disease of the heart, which causes the organ to become decompensated, death following as a result. Many respectable physicians testified that in their opinion the deceased would not have been

able to survive the normal delivery of a child, and the only testimony to the contrary was that of a pathologist who examined the body of the deceased after the autopsy and after it had been embalmed, and who gave his opinion that the operation was not necessary to preserve life. This pathologist never had seen the deceased during her lifetime, had never made any examination of her, and based his opinion solely upon an examination of the organ after it had been removed from the body by the autopsy surgeon. Nevertheless, the Supreme Court of California held that the evidence was sufficient to warrant the jury in finding that the operation was not necessary to preserve life, and confirmed a conviction of manslaughter.

The evidence is infinitely stronger in the case at bar, because we have here the testimony of the attending physician, the clinical history of the case and the presence in the blood specimens of the deceased of organisms which might be rickettsia, phenomena frequently present in cases of Rocky Mountain Spotted Fever but which may not appear where the onset of the disease is so rapid as in the case of Dr. Barr.

That the opinion of qualified medical witnesses taken in connection with the history of the case is sufficient to warrant a recovery.

It is elementary law that a physician may testify that a certain condition **might have** or would be **likely** to have resulted from a certain cause, and is permitted to state his inference as to the cause of certain injuries, of an observed physical condition, or of the death of a person. He may testify as to whether

certain detailed occurrences would be a natural, sufficient, probable, or possible cause of death.

In

Dow v. City of Oroville, 22 Cal. App. 215, 217, 134 Pac. 197,

it is said:

> "The opinions of medical doctors as to the manner in which or the means by which a person **may have received** physical injuries are always receivable in evidence as those of experts in such matters."

In

People v. Sampo, 117 Cal. App. 135, 149, 118 Pac. 957,

which was a prosecution for murder, the Court says:

> "Nor was it error, it may be observed, in this connection, to permit the physicians to testify that the wound **could have been inflicted** by means of said rock. The physicians were not asked by whom the wound was inflicted, nor whether the wound was caused by the use of the rock exhibited to them, but were simply asked whether, in their opinion, such a wound as the one they found on the head of the deceased could have been inflicted by means of the rock. Opinions of medical doctors as to the means which might have been employed in producing wounds upon the human body are always receivable in evidence as those of experts upon that proposition, and we know of no principle to which admission of such testimony is repugnant. The manner by which a wound is produced is as much within the range of subjects as to which opinions of experts may be given in

evidence as is the proximate or approximate cause of death, and **no one will dispute the competency, as evidence, of the opinion of a physician as to the direct or remote cause of one's death.**"

In

Schuh v. Oil Well Supply Co., 50 Cal. App. 588, 195 Pac. 703,

a doctor who examined the plaintiff about three months after his accident described the condition in which he found the patient, and testified that he could not say whether the condition was part of or resultant from any improper treatment prior to the time that he had made the examination. The Court said that the admission of the evidence was proper, and that whether or not the condition found by the doctor was one of the natural consequences of the accident was a question for the jury.

In

Travelers Insurance Co. v. Drake, 89 Fed. (2d) 47,

this Court uses the following language:

"No one is more able to testify as to the effect upon the human body or functions of organs of the human system of certain causes than those who by years of study and practice of medicine and experience possess. Doctors, being learned in the construction of the human body and the relation of the several parts to each other, may advise as experts what the necessary effect upon the vital spark which certain causes might produce. No layman can be credited with such knowledge. **A physician, as an expert, may state**

his opinion as to the cause of death, or whether given injuries or conditions would cause death."

The Court cites, *inter alia,*

People v. Potigian, 69 Cal. App. 257, 231 Pac. 593;

Foley v. Northern California Power Co., 165 Cal. 103, 30 Pac. 1183;

Spicer v. Benefit Association of Railway Employees, 142 Ore. 574, 17 Pac. (2d) 1107, 90 A. L. R. 1517;

Nicholson v. Roundup Coal Mining Co., 79 Mont. 358, 257 Pac. 270.

The Court then proceeds:

"The clinical history from the date of the accident to his death, supplemented by the findings of the autopsy and evidence of deceased's prior good health, was produced. Some factual evidence showed that deceased was physically and mentally active and energetic in his business, did not appear to suffer from any trouble of the heart, brain or kidneys, showed no inconvenience from sudden exertion, nor shortness of breath, no chest pains, no blurring of the vision, etc. From this evidence, and other testimony, stated in the hypothetical questions, two physicians testified that death was the result of the injuries, without any other contributing cause. * * * While the jury is the sole judge of the facts as to the issue of death, and causes of death, that does not, however, make objectionable the opinion of a medical expert in aid of the jury to find the ultimate fact."

The Court cites a number of Federal decisions in support of this statement.

See, to the same effect:

Haskell & Barker Car Co. v. Erickson, 73 Ind. App. 657, 128 N. E. 466;

Groves v. Webster City, 222 Ia. 849, 270 N. W. 329;

Bishop v. Shurly, 237 Mich. 76;

Spicer v. Benefit Association, 142 Ore. 574, 17 Pac. (2d) 1107;

Leavitt v. Bacon, 89 N. H. 383, 200 Atl. 399;

Browning v. Hoffman, 90 W. Va. 568, 111 S. E. 492.

Fortunately, there are a number of cases in which the Courts have had occasion to consider the sufficiency of the evidence to establish that death resulted from infection caused by the bite of an insect. One of these cases, to-wit, *Reinoehl v. Hamacher Pole & Lumber Co.* (Idaho), 6 Pac. (2d) 860,* involved a death caused by Rocky Mountain spotted fever originating in a tick-bite. The proceeding was brought under the Idaho Workmen's Compensation Law by the widow of the deceased to recover compensation for his death. The Industrial Accident Board denied workmen's compensation to the claimant, and its judgment was affirmed by the District Court on an appeal taken pursuant to the Idaho statute. This judgment was reversed by the Supreme Court of Idaho, and the case remanded

*This case is not listed in the Pacific Reporter Digest, and we have been unable, therefore, to cite the volume and page of the Idaho Reports where it appears.

with directions to award compensation to appellant. The facts are stated in the opinion of the Court as follows:

> "James Edward Pierce was employed as a swamper by the Hamacher Pole & Lumber Company, at a camp about four miles from Rathdrum, Idaho. He went to work on March 22, 1930, worked around the camp two or three days, and then went into the woods, where his working hours were from 8 a.m. to 5 p.m. Lunch was brought at noon each day to the workmen, by servants of the employer, and the employees ate such lunch in the woods, returning each night to the camp. Wood ticks were very plentiful on the brush in the woods, and fell upon Pierce and his fellow employees. While working it was not always noticed when a tick fell on a man, or when it bit him. On return to camp in the evening, it was customary for the men to strip and pick the ticks off each other and burn them. The camp was located in a five-acre clearing free of brush and ticks. All the men boarded and roomed in the bunkhouse at the camp, and while they were free to come and go as they pleased, after working hours, none of them left the camp at night. The evidence shows that wood ticks do not stay at camps, but infest the brush. Pierce was in Spokane from about March 1, 1930, until he went to work on the 22d. On April 3, 1930, he complained of having a headache and chills, but refused to go to a doctor. He did not get better, but worked through until Saturday night, April 5, when he was taken to Spokane, where he put up at the Fernwood Hotel. A brother, staying at the Galax Hotel, called on him, but was unable to procure a

physician on Sunday. On Monday, April 7, Pierce was taken by his brother to St. Luke's Hospital, where he died of Rocky Mountain spotted fever on the morning of April 9, 1930. The doctor testified that he had many insect bites, which were reported by those having the care of the patient before he entered the hospital as tick bites; that they conformed in every way to those produced by ticks; and that his opinion was that they were tick bites.

"The Industrial Accident Board found the facts substantially as stated; that Pierce **died of Rocky Mountain spotted fever; 'that said spotted fever was the result of a tick bite or bites'**; and that his death was not 'the result of a personal injury by accident arising out of and in the course of his employment.' On appeal, without any further testimony being taken, the district court found, in addition to the board findings, 'that said spotted fever was the result of a tick bite or bites received by said James Edward Pierce in the course of his employment, and while employed as a "swamper," as set forth in paragraph 3 of the findings.' The district court further found: '(7) That there remains but one other question and that is whether a tick-bite can be termed an accident. Taking the ordinary meaning of the word "accident", we are unable to find that a "tick-bite" is an accident.' * * *"

The Supreme Court of Idaho reversed the judgment, on the ground that the District Court had committed error in holding that death ensuing from a tick-bite was not an accidental death. It appears from the

opinion of the Court that the sufficiency of the evidence to justify the finding that the deceased died of Rocky Mountain spotted fever resulting from a tick-bite was unquestioned.

In

Omberg v. United States Mutual Accident Association, 101 Ky. 303, 40 S. W. 909,

the evidence was held sufficient to warrant the submission to the jury of the question whether the insured's death was caused by blood poisoning superinduced by the bite or sting of a mosquito; and it was held that, if they so found, his death was effected through "external, violent and accidental means." The Court said:

> "Whether the death of Omberg was caused by blood poisoning, itself superinduced by the bite or sting of some insect, was a question of fact for the jury; the affirmative of these propositions was supported by the evidence of the two attending physicians, and which is confessedly entitled to much weight. Even if we discard the statement of the patient that the spot on the foot was the result of the bite of a mosquito, we still have the condition of the inflamed part, which, in the opinion of an expert, presented such an appearance as might have been caused by the sting or bite of an insect. The jury might have reasonably concluded, from the evidence, that the injury to the toe was so caused, especially as such a condition is shown not to be an unusual result of such sting or bite. **The jury might also have believed that death was caused by blood poisoning induced by the sting or bite—they certainly**

might have so believed from the evidence of the attending physicians. When these conclusions on the facts are reached, we are of the opinion that, as a matter of law, the death of the assured could be as truly said to have been effected through 'external, violent, and accidental means' as though death had been caused by the sudden, unforeseen, and unexpected bite of a poisonous snake. The bite was external, violent and accidental. If a bite at all, it was certainly external. It came from without, and its marks were even visible to the naked eye. The force of it was not as great, perhaps, as if inflicted by a rattlesnake; but the means were not the less violent, within the meaning of the policy. It was also accidental, because unexpected, unforeseen, and happened as by chance. It was not designed or brought about voluntarily. But for it, the blood poisoning and death would not have resulted. The blood poisoning was consequent on the wound; the bite would, therefore, be the proximate cause of death."

See, to the same effect,

McAuley v. Casualty Co. of America, 39 Mont. 185, 102 Pac. 586; and

North Wildwood v. Cirelli, 29 N. J. L. 302.

In the latter case, the New Jersey Court of Errors and Appeals affirmed an award of compensation to the widow of a lifeguard, who claimed that the deceased met his death in the course of his employment from an infection from an insect bite. We set forth the statement of facts given in the opinion of the Court, as they are similar to those in the case at bar and were held sufficient to entitle the claimant to a recovery.

"We find the salient facts to be: On August 5th, 1940, decedent was in the employ of the City of North Wildwood as a life guard. In accordance with his prescribed duties he was clad in the regulation apparel of the municipal life guards, consisting of trunks and jersey, which left the arms, shoulders and legs exposed, and he was on duty from nine in the forenoon to five in the afternoon. Between two and three o'clock in the afternoon of that day, so clothed, while sitting in the performance of his duty on the life guard stand, he was bitten on the left forearm by an insect, probably by one of the many green-headed flies that had been brought in by a west wind and were at the time infesting the beach front. He slapped his arm, contemporaneously remarked that something had stung him and began scratching at a red spot that almost instantly developed. The arm became inflamed and much swollen. Within two days suppuration had reached the point that, upon pressure, pus discharged without incision. Cirelli became worse, suffered from chills and fever, had severe pains in the groin and was taken, on August 23d, to the Atlantic City Hospital. Despite hospitalization and medical treatment he died on September 24th from staphylococcemia, a pus condition which follows the introduction of staphylococcus bacteria into the bloodstream. **It was the opinion of competent medical witnesses, which we accept as correct, that the point of entry of the staphylococci was the weakened skin tissue at the locus of the insect bite. Death was the result of the insect bite.**"

There is extremely apposite language found in certain decisions of the Supreme Court of the United

States and other federal Courts. A few quotations will suffice:

> "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the **jury** is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties."
>
> *New York Life Ins. Co. v. Gamer,* 303 U. S. 171-173, 82 L. Ed. 731.

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that **the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it.** Hart v. Newland, 3 Hawks, 122."
>
> *Home Ins. Co. v. Weide,* 78 U. S. 197, 198, 11 Wall. 438, 78 L. ed. 197.

In a case in which there was a pronounced conflict in the medical testimony as to the probable cause of death, the Court, in the case of *Commercial Travelers' Mutual Accident Assn. v. Fulton,* 93 Fed. 621, 622, uses this language:

> "On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the side-

walk, waiting for a street car, suddenly fell, striking upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises, not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It is not disputed that, at the time of his fall, Fulton was affected with a diseased heart. The primary question in the case is whether the fall produced such an effect upon the brain that he died in consequence of the blow thus received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived. The medical testimony is voluminous, and we have carefully examined it. That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury. That there was sufficient evidence to take the case to them, we have no doubt. Two, at least, of the physicians testified that, in their opinion, death was caused by an injury to the brain; such opinion being founded in part upon the assumption in the hypothetical question, which elicited such opinion, that immediately after the fall Fulton 'was unconscious, only exclaiming, "Oh!" as he was turned over; breathing hard, as if he was blowing something, and with a rattling noise; his face not pale, but fresh-looking; and died within fifteen minutes

to half an hour, without having regained consciousness'. These phenomena, they testify, are characteristic rather of a death from injury to the brain than from heart disease. **It is true that when, upon cross-examination, the condition of deceased's heart was disclosed to them, they both concede that the organic disease of the heart may have had something to do with the death;** but one of them, at least, at the very close of his testimony, testified that the injuries to the head and brain described in the narrative of the post mortem would have been sufficient to cause death, even in the case of a healthy heart. In view of this evidence, and of the testimony of those who saw him fall, and picked him up, that his condition, as to color, breathing, and apparent unconsciousness, was such as is described in the hypothetical question, it would have been error to direct a verdict for defendant."

In

Aetna Life Insurance Co. v. Wicker, 240 Fed. 398, 399

the Court, holding that the evidence was sufficient to show that the deceased met his death from appendicitis having a traumatic origin rather than from chronic appendicitis, uses the following language:

"It is alleged that on the 11th day of February, 1915, Wicker accidentally slipped while walking on an icy pavement in the city of Niagara Falls and fell upon his right side with his arm doubled up under him across the right side of the abdomen. He suffered much pain during that day, ate little and retired early. The pain increased during the next day. The night following the pain increased

and a physician was called. He found Wicker suffering from general peritonitis which about a week later resulted in death.

"An autopsy was requested and granted and all the physicians present, whether representing the plaintiff or the defendant, agreed that Wicker died of peritonitis or inflammation of the appendix. If there were nothing but the fall on the icy sidewalk, the bending of the arm under the abdomen and the paroxysms of pain constantly increasing until death ensued, the question would be one of fact for the jury to say whether the fall produced the disease which caused the death. It being a question where men learned in the medical profession might assist the jury in arriving at a correct result, it was proper that the jury should have the benefit of their experience. It is unnecessary to enter upon a detailed analysis of their testimony.

"Dr. Chapin, who saw Wicker after the accident, and was in consultation with Dr. Scott, the physician for the Wicker family, testified upon facts, some of which he knew and some of which were assumed. In answer to the question, 'What was the cause of the appendicitis from which he suffered?' the doctor answered, 'The fall on the sidewalk.' Dr. Bentz, called for the defendant, in answer to the question, 'What was the cause of his death?' replied, 'The cause of his death was a general purulent inflammation of the peritoneum or abdominal lining, that being due to a perforated appendix.'

"It is unnecessary to quote further from the medical testimony. **These answers present the two theories and it was for the jury to decide be-**

tween them. Upon the evidence the jury were justified in finding that the fall on the icy sidewalk produced the appendicitis which caused Wicker's death. That the question here involved is one of fact for the jury is sustained by an almost unbroken line of authorities."

CONCLUSION.

The foregoing authorities clearly hold that in such a case as the case at bar, the question as to the cause of death is a question of fact and not a question of law. Indeed, the evidence as to the cause of death is far stronger than in many of the cases heretofore cited in which the Courts held that a *prima facie* case was established. It was error, therefore, for the learned trial judge to grant the motion of the appellees in each case for a dismissal.

It is respectfully submitted that each judgment and order of dismissal appealed from should be reversed, and the causes remanded for a new trial.

Dated, San Francisco,
November 13, 1944.

JOHN J. TAAFFE,
KEITH R. FERGUSON,
Attorneys for Appellants.